

**TESTIMONY BEFORE THE FEDERAL RESOURCES COMMITTEE****FEBRUARY 16, 2002**

Good afternoon ladies and gentlemen. My name is Ed Schrock and I am the Nebraska State Senator from the 38<sup>th</sup> Legislative District. Currently, I serve as chair of the legislature's Natural Resources Committee. I am also a landowner and farmer in northern Phelps County. I am here today to testify regarding the Cooperative Agreement for Endangered Species on the Platte River and the proposed designation of critical habitat for the piping plover.

The Cooperative Agreement is important to Nebraska as it provides a means to resolve most Endangered Species Act consultation issues and it serves as the basis for the Federal Energy Regulatory Commission licenses for the Central Nebraska Public Power and Irrigation District and for Nebraska Public Power District. It also serves as the basis for the reasonable and prudent alternatives for other water related activities such as the surface water irrigation projects in the Nebraska panhandle that receive water from federal reservoirs in Wyoming.

This proposed program has, as its cornerstones, provided land and water to protect and improve the habitat for three endangered species, including the piping plover, and to test whether or not the actions taken for these species might benefit a fourth species, the Pallid Sturgeon, which occasionally enters the lower Platte.

While the Cooperative Agreement provides a means to handle issues related to the four endangered species, it also has impacts upon individual residents and businesses within the state and requires consideration of legislation by the state to enable the state to fully comply with some of the proposed provisions of this program.

Many of the issues related to managing endangered species in the Platte basin require changes in the timing and quantity of water flowing in the Platte River. Nebraska has very specific laws related to water allocation and use that have served the state well for over 100 years. Indeed Nebraska's constitution provides for the right of its citizens to use the surface waters of the state for beneficial purposes. These constitutional and legal provisions are the foundation for much of Nebraska's agricultural economy as well as the communities built around that economy. Since those early laws were passed there is now the recognition that it is not just the uses of surface water that impact the river but that the use of our vast and important ground water resources are linked integrally with our rivers and streams. Because resolving the biological issues require modifying some of our actions related to the river, we must also address the relationship of ground water and surface water of the state.

Nebraska has also established a clear system of water rights based upon the uses of the water and the priority date of those uses. Creatively solving some of the endangered species issues in the Platte Basin requires that we consider means of flexibility within these rights, while at the same time protecting those rights and uses for future generations.

As we speak, the legislature and my committee specifically, are considering various pieces of legislation related to leasing and banking water rights, conversion of water rights between uses, establishing a legal linkage between ground water and surface water and so on. My committee has advanced a bill, LB 1023, to the full legislature for debate. This bill creates a Water Policy Task Force which will examine five

issues relating to water policy in Nebraska over the course of eighteen months at a cost of \$750,000.00.

While the state was likely to have considered these issues in its own time frame, the Cooperative Agreement discussions are forcing us into the situation of considering many of these issues in a compressed time frame. While these issues are important to resolving endangered species issues in the context of the Cooperative Agreement, it is more important that the legislature of the state consider very carefully the long term effects that any of these actions might have. The legislature will not jeopardize the constitutional rights of our citizens or our agricultural economy in Nebraska because of rushed or ill-considered measures.

That being said, let me extend my support to the Cooperative Agreement process. A cooperative process among the states and the federal government - let me emphasize the cooperative part, because my understanding is that many of the delays and arguments in finalizing this program are a result of the federal agencies insisting on "their way is the only way" - a cooperative process is the most effective way to protect and manage the species of concern and at the same time consider the needs of the state and of its citizens.

Because under the formal procedures of the Endangered Species Act, only those activities with a direct federal nexus are required to consult, and therefore often times mitigate for impacts to endangered species, the costs of the Act often are levied only upon a few, leading to an unbalanced burden for what is truly a national issue. Under this proposed program many water related activities not normally within the purview of the Act are brought into the mix, this increases the burden upon the state and results in not just our consideration of legislation which I mentioned earlier, but also an increase in costs. These costs are a result of federal actions on behalf of the entire nation. For these reasons, I believe that the federal government should bear the majority of costs for these activities. It is my understanding that as the drafters of this proposed program have developed the details of the program, they have discovered their original estimate of 75 million dollars is likely to be only half of what is needed to adequately fund the program. While a 150 million dollar program is small by comparison to similar programs in California and Florida, it is a huge commitment upon the part of the states. Because Nebraska, in particular, is already incurring costs related to the implementation of this program through water and habitat and through potential changes to our laws, I feel that it is the responsibility of Congress to fund the additional cash portion of this program.

This program, given adequate funding and the participation of the Fish and Wildlife Service in a truly cooperative fashion, has the ability to provide meaningful management for the endangered species in question, to preserve and protect the people, social systems, and economics of the basin, and also to serve as a model for the entire nation. However, it is only when the leaders of the Fish and Wildlife Service and its sister agencies can communicate effectively their vision of how the Act was intended to work for the benefit of the species and people, to the field representatives of the agencies, that a program such as this can work.

Often times, it appears to me, the best intentions of all the parties notwithstanding, that individuals within the participating groups misuse the powers granted to them by the people of the United States, and ultimately thwart what is best for all. It would be a tragedy if this potentially, "landmark" program were destroyed by a few individuals, who feel very strongly that their opinions and visions are what is best for everyone. It seems that these individuals would rather have continuous legal battles instead of a program built upon mutual trust and a goal of finding the truth through adaptive management and good scientific investigation.

It is exactly this apparent use of individual opinions rather than sound, measured scientific knowledge that disturbs me as I read about and hear from my constituents regarding the proposed designation of critical habitat for the piping plover.

Aside from the obvious lack of scientific foundation for large parts of this proposed designation and from the obvious procedural disregard for public input in the process, which I will address shortly, there is already a far better means to protect this bird and its habitat than by a critical habitat designation. This means is the Cooperative Agreement. Here is a proposed program whose sole purpose is to manage and protect piping plovers, least terns and whooping crane habitat and to do it in a cooperative fashion using adaptive management techniques and relying upon the collection of sound scientific data to guide those decisions. This is a process that is not an edict from some over-zealous bureaucrat but a process that involves the states and the people who live along the river and work with these birds regularly. This is the way to truly and effectively protect and manage these birds. Using an alternative program is not without precedent. In the process of this very proposed listing, several areas were excluded based upon the existence or proposed existence of a management plan that adequately protected the birds and their habitat. Perhaps the best example of this is the exclusion of Lake McConaughy from the proposed designation. This lake's shore, unlike the Central Platte River, IS the nesting area for one of the largest concentrations of piping plovers anywhere in North America. Yet because the owner of this lake, the Central Nebraska Public Power and Irrigation District, has a Federal Energy Regulatory Commission license that requires them to have a shoreline management plan that includes protection of the birds, this lake was excluded. Certainly a program developed by a group including the Fish and Wildlife Service and the three states and participants such as the district is adequate protection without the undue regulation and restrictions that may come from critical habitat designation.

Regarding the procedural issues surrounding this proposed designation, I am appalled at the actions of the Fish and Wildlife Service. The Service has had since 1985, when it listed the piping plover as threatened, to designate critical habitat. At that time the Service, in my view, correctly found that it was not appropriate to designate critical habitat, because of the transitory nature of the birds' nesting requirements. Notwithstanding that original finding as a result of a lawsuit, the Service has now, for the very reasons it found inappropriate in 1985, proposed critical habitat designation. In June of 2001 the Service proposed this designation, providing only an incomplete environmental analysis, not the least omission of which was an economic analysis. This so-called economic analysis dated November 2001, was released to the public December 28, 2001, with a requirement that comments were due in 30 days. Clearly the Service had the time after the court decision to compile the necessary data and complete the necessary analyses in a timely manner to fulfill their obligations; and yet, the Service chose not to release this document until they held it for over a month and then during a holiday week. Not only was it released when few people were available, but it was to be provided to the public electronically over the Department of the Interior's website that was and is inaccessible. Clearly, this was meant to restrict public participation. Perhaps more importantly, the 30-day comment period required by the Service is in clear violation of the 60-day review requirement of the Act. Even with a court order setting their schedule, the Service cannot use its own negligence as an excuse for not complying with the law.

Notwithstanding the unacceptable procedural elements, the economic report provided by the Service was, in my opinion, completely inadequate. The argument that there is little or no additional economic impact as a result of habitat designation beyond the species listing does not ring true nor does it comply with the recent decision of the 10<sup>th</sup> Circuit Court regarding economic analyses. In my own district, the Central Nebraska Public Power and Irrigation District's FERC relicensing shows what effects can result from such a listing. This 14-year relicensing was long and contentious, not so much because of the existence of endangered species, but because of the critical habitat designation of the central Platte River for the whooping crane. I want to emphasize that it was the habitat NOT the species, which caused most of the problem in that relicensing. Additionally, the economic analyses provided by the Service did not consider

the costs incurred by individuals and businesses either directly or as lost opportunities. No analysis was made of impacts to sand and gravel mining, housing developments, recreation, municipal water supplies, agriculture, and I could go on. Clearly this report is inadequate to depict the true costs of this proposed legislation.

Lastly, I want to discuss the species itself and the proposed critical habitat designation. I want this committee to know that I believe the Endangered Species Act, as conceived, is an important and meaningful piece of legislation. I support protecting endangered species and their habitat when it is truly in the interest of the species and does not come at an undue price to the public.

However, much of this proposed designation for critical habitat for piping plovers is not appropriate. Historical data indicates that this species was never very abundant on the central Platte and in fact may never even have nested in this region until after water development activities took place. Evidence exists today that in much of the area proposed for designation, piping plovers have never nested. Indeed, except for sand pits and other artificially created habitat which are specifically excluded from the designation, there have been no piping plovers nesting above Grand Island, Nebraska, for over 10 years. This is not critical habitat either in fact or by the Services standards applied elsewhere in the designation. If there are natural habitats where nesting has regularly occurred then those areas should be specifically defined as provided in the law and then properly designated. Blanket designation of large undescribed reaches of land without any nesting violates the law and further undermines the credibility of the Fish and Wildlife Service.

I thank you for this opportunity to provide input into this important process, and for your time.

####